**PP**

**v.**

**WAN MOHD KAMIL WAN MOHAMAD**

FEDERAL COURT, KUALA LUMPUR
ABDUL MALEK AHMAD FCJ
MOHD NOOR AHMAD FCJ
HASHIM YUSOFF JCA
[CRIMINAL APPEAL NO: 05-56-2000 (B)]
28 AUGUST 2003
(12 FEBRUARY 2004)

***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 12(2) - Conviction - Possession of dangerous drugs - Propriety of conviction - Accused convicted and sentenced on a reduced charge of possession of cannabis under s. 12(2) Dangerous Drugs Act 1952 - Whether s. 6 the applicable provision for possession of cannabis - Whether s. 12(2) applied to possession of Indian hemp - Whether miscarriage of justice occasioned - Whether proviso to s. 92(1) Courts of Judicature Act 1964 applicable*

The respondent was initially convicted under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in 3,839.9 grams of cannabis and sentenced to death under s. 39(B)(2) of the same. On appeal, the Court of Appeal convicted him on a reduced charge to one of possession of cannabis under s. 12(2) DDA and sentenced him to five years' imprisonment under s. 12(3) of the same. In this appeal by the deputy public prosecutor herein, the respondent raised a technical preliminary point on whether the reduction of the charge to possession under s. 12(2) DDA applied to possession of Indian Hemp and not possession of cannabis.

**Held:**

**Per Abdul Malek Ahmad FCJ**

**[1]** Before the classification of Indian Hemp was deleted *vide* PU(A) 170/96 in the First Schedule to the DDA, about two months after the High Court decision in this case, the position was that a person found guilty of possession of Indian Hemp would be sentenced under s. 12(3) DDA. However, where the drugs were cannabis he would be punished under s. 6 DDA. Reducing the trafficking charge to one of possession under

s. 12(2) DDA where the punishable possession is under s. 12(3) thereof meant that the Court of Appeal held that the drugs were Indian Hemp and not cannabis. This was certainly contrary to its finding that the drugs were cannabis. This charge should then have been reduced to one under s. 6 DDA. Evidently, the respondent should have been sentenced on a reduced charge of possession of cannabis and not possession of Indian Hemp. Since the respondent had in fact served the full sentence imposed on the erroneous charge, the proviso to s. 92(1) of the Courts of Judicature Act 1964 could be relied upon to dismiss the appeal and confirm the conviction and sentence. (pp 437 g-h & 438 a-e)

*[Appeal dismissed.]*

**Legislation referred to:**
Courts of Judicature Act 1964, s. 92(1)
Dangerous Drugs Act 1952, ss. 2, 12(2), (3), 37(d), (da), 39A(1), (2), 39B(2)

*For the appellant - Vong Poh Fah, DPP*
*For the respondent - Karpal Singh; M/s Karpal Singh & Co*

*[Appeal from Court of Appeal, Criminal Appeal No: B-05-13-96]*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Abdul Malek Ahmad FCJ:**
The respondent had been sentenced to death by the Shah Alam High Court on 30 January 1996 for trafficking in 3839.9 grams of cannabis in a Proton Saga car with registration number BDH 883 in front of a house No. 9 Jalan 1/1 Bandar Kinrara, Puchong, Selangor on 29 December 1994 under s. 39B(2) of the Dangerous Drugs Act 1952 (hereinafter "the Act").

The respondent was seen by the police party standing next to the car on the right side near the driver's seat. From the respondent's right hand was taken the car keys and from his right trouser pocket was taken eleven keys. On the floor board in front of the left front passenger seat was found a box with two slabs of dried leaves in a plastic wrapper. From one of the eleven keys, the police party managed to enter the house and recover case exhibits believed to be drugs but which do not form part of the charge. The charge related only to the drugs found in the car.

Subsequently, the Chemist analysed the drugs recovered in the car to be 3839.9 grams of cannabis as defined in s. 2 of the Act. The learned High Court judge was satisfied with the evidence given by the Chemist to this effect. The court was also satisfied that the car belonged to the respondent as in fact the car door was opened with the car keys obtained from the respondent. In consequence, it was the finding of the court that the drugs were in the custody and control of the respondent. Accordingly, the respondent, until the contrary was proved, was presumed to be in possession of the drugs and because of its weight, was presumed to be trafficking in the said drugs.

In his sworn testimony, the respondent admitted that the car was his but said that the house was not. The car was left there by his friend Ahmad Azahan bin Abdul Rahman, prosecution witness SP9, who had given him the house keys to enter the house to get the car keys from inside. He added that he was totally unaware of the box found in the car by the police party. Of course, the learned High Court judge did not believe his denial, as SP9 was never questioned on these facts, and held that, on a balance of probabilities, it did not rebut the presumptions under s. 37(d) and (da) of the Act raised by the prosecution and, therefore, did not raise any reasonable doubt as to the case presented by the prosecution.

Before us, Karpal Singh for the respondent informed the court that he had a technical preliminary point as the petition presented by the appellant did not advert to the grounds the Court of Appeal allowed the appeal and substituted the sentence imposed. He referred to p. 20 of the notes of evidence in the High Court which states:

> Indian Hemp is synonimus (sic) to cannabis. It is another name for cannabis. There is no different (sic) between Indian Hemp and cannabis. This information is based on scientific literature.
>
> **XXD** Encik Bhagwan Singh.
>
> P: I put it to you there is a legal distinction between cannabis and Indian Hemp.
>
> A: No comment.

He added that it was on this ground, namely the question of cannabis or Indian hemp, that the Court of Appeal allowed the appeal. However, in its judgment, the Court of Appeal did not refer to the actual reason.

On the testimony of the Chemist, the Court of Appeal said:

> It is clear that the Chemist carried out a detailed analysis of the plant contained in the 2 packets and he testified positively that the result of his test showed that the plant material examined by him was cannabis as defined under s. 2 of the DDA 1952.
>
> It is our considered view the evidence given by the Chemist was satisfactory and cannot be faulted. In the premise we hold that the appeal on this issue is without merit.

Learned counsel then referred to s. 92 of the Courts of Judicature Act 1964 (hereinafter "the CJA") where sub-s. (1) states:

> 92. Powers of Federal Court
>
> (1) At the hearing of an appeal the Federal Court shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Federal Court may thereupon confirm, reverse or vary the decision of the Court of Appeal, or may order a retrial or may remit the matter with the opinion of the Federal Court thereon to the High Court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the Court of Appeal or the High Court might have exercised:
>
> Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

The learned deputy for the appellant in reply readily agreed with learned counsel for the respondent that the sentence imposed clearly reflected that the conviction was for Indian hemp and not for cannabis.

Pertaining to the classification of the dangerous drugs, the Chemist had given evidence that there is no difference between cannabis and Indian hemp as seen from the extract in the reproduced notes of evidence. Before the classification of Indian hemp was deleted *vide* P.U.(A) 170/96 dated 3 April 1996, which is about two months after the High Court decision in this case, the position was that a person found guilty of possession of Indian hemp, classified under Part III of the First Schedule to the Act, would be sentenced under s. 12(3) of the Act where he would be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both. However, where the drugs were cannabis, he would be punished under s. 6 of the Act and liable on conviction to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding five years or to both.

Where a person is found guilty under s. 6 of the Act and the cannabis weighs 20 grammes or more but less than 50 grammes, he shall be punished under s. 39A(1) of the Act with imprisonment for a term which shall not be less than two years but shall not exceed five years and he shall also be punished with whipping of not less than three strokes but not more than nine strokes. Where the weight of cannabis is 50 grammes or more, then he shall be punished under s. 39A(2) with imprisonment for life or for a term which shall not be less than five years and he shall also be punished with whipping of not less than ten strokes.

Reducing the trafficking charge to one of possession under s. 12(2) of the Act where the punishable possession is under s. 12(3) of the Act meant that the Court of Appeal held that the drugs were Indian hemp and not cannabis. This was certainly contrary to their finding that the drugs were cannabis. The charge should have then been reduced to one under s. 6 of the Act and, because of the amount, read with s. 39A(2) of the Act.

The learned deputy was not pressing with the appeal and the respondent had in fact not been served. We could easily have struck out the appeal in the absence of the respondent without even hearing the merits. Despite not being served, the respondent had turned up on advice of his counsel.

Having analysed the matter carefully, it is evident that the respondent should have been sentenced on a reduced charge of possession of cannabis and not Indian hemp. Since the respondent had in fact served the full sentence imposed on the erroneous reduced charge, we relied on the proviso to s. 92(1) of the CJA to dismiss the appeal and confirm the conviction and sentence.